**FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION**

1730 K STREET NW, 6TH FLOOR

WASHINGTON, D.C. 20006

May 22, 1996

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| SECRETARY OF LABOR, | : | |
| MINE SAFETY AND HEALTH | : | |
| ADMINISTRATION (MSHA) | : | |
| | : | |
| v. | : | Docket No. KENT 91-179-R |
| | : | |
| PEABODY COAL COMPANY | : | |

BEFORE: Jordan, Chairman; Holen and Marks, Commissioners[1]

DECISION

BY THE COMMISSION:

This contest proceeding arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (1994) ("Mine Act" or "Act"). At issue is a citation,[2] issued by the Department of Labor's Mine Safety and Health Administration ("MSHA"), alleging that Peabody Coal Company ("Peabody") violated 30 C.F.R. § 75.316 (1991) by operating a mine without an approved ventilation plan.[3] The Commission previously remanded this matter to the

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[1] Commissioner Doyle participated in the consideration of this matter but resigned from the Commission before its final disposition. Commissioner Riley assumed office after this case had been considered and decided at a Commission decisional meeting. A new Commissioner possesses legal authority to participate in pending cases, but such participation is discretionary. *Mid-Continent Resources, Inc.,* 16 FMSHRC 1218 n.2 (June 1994). In the interest of efficient decision making, Commissioner Riley has elected not to participate in this matter.

[2] Originally, this proceeding involved a second citation at another of Peabody's mines, the Camp No. 2 Mine (15 FMSHRC 381, 382 (March 1993)); however, that mine is no longer operating and the Secretary has withdrawn the citation against it. S. Br. at 4 n.3.

[3] Former 30 C.F.R. § 75.316 implemented section 303(o) of the Mine Act, 30 U.S.C. § 363(o), and provided:

> A ventilation system and methane and dust control plan and revisions thereof suitable to the conditions and the mining system of the coal mine and approved by the Secretary shall be adopted by the

administrative law judge to determine whether a disputed ventilation plan provision was "suitable" to the conditions at Peabody's mines. *Peabody Coal Co.*, 15 FMSHRC 381, 388 (March 1993) ("*Peabody I*"). The Commission stated that the Secretary of Labor bears the burden of proving the suitability of a disputed plan provision. *Id.* On remand, Administrative Law Judge Gary Melick concluded that the Secretary established that the disputed plan provision was suitable. *Peabody Coal Co.*, 15 FMSHRC 1703 (August 1993) (ALJ). The Commission granted Peabody's petition for discretionary review ("PDR"). For the reasons that follow, we affirm the judge.

I.

Procedural and Factual Background

A. *Peabody I*

The background facts in this proceeding are fully set forth in *Peabody I*, 15 FMSHRC at 382-85, and are summarized here. Peabody's Martwick Mine utilizes a method of continuous mining known as "deep cut" or "extended" mining that involves making cuts deeper than 20 feet from the last full row of permanent roof supports. *Id.* at 382 & n.2. In January 1991, as a result of its regular 6-month review of Peabody's ventilation plan at the mine, MSHA insisted that Peabody include in the plan a deep cut ventilation provision applicable to the roof bolting stage of the mining cycle. The new provision required Peabody to extend the line curtain during roof bolting in deep cut entries to within 10 feet of the last row of bolts being set and to supply 3,000 cubic feet per minute ("cfm") of air at the inby end of the curtain. In Peabody's previously approved plan, the line curtain was not placed in deep cuts until completion of roof bolting and there was no prescribed minimum air volume during roof bolting. *Id.* at 15 FMSHRC at 382-83; 15 FMSHRC at 1703 (ALJ decision on remand).

Peabody objected to inclusion of the new provision. After unsuccessfully negotiating with Peabody, the Secretary refused to approve a revised ventilation plan that did not contain the disputed provision and issued a citation to Peabody alleging a violation of section 75.316 for

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> operator and set out in printed form on or before June 28, 1970. The plan shall show the type and location of mechanical ventilation equipment installed and operated in the mine, such additional or improved equipment as the Secretary may require, the quantity and velocity of air reaching each working face, and such other information as the Secretary may require. Such plan shall be reviewed by the operator and the Secretary at least every 6 months.

When MSHA revised and renumbered its ventilation plan standards in 1992, 30 C.F.R. § 75.316 was superseded by 30 C.F.R. § 75.370 (1995), 57 Fed. Reg. 20,868, 20,910-12, 20,924 (May 15, 1992).

operating without an approved plan. Peabody submitted, under protest, a plan containing the provision required by the Secretary. *Peabody I*, 15 FMSHRC at 382-84.

Peabody filed a notice of contest and a hearing was held. In his first decision, Judge Melick concluded that the new deep cut ventilation provision was mine-specific and not a standard of general application that was subject to rulemaking requirements. He determined that Peabody had failed to negotiate with the Secretary in good faith over the provision and affirmed the citation. 13 FMSHRC 1332, 1335-37 (August 1991) (ALJ). On review, the Commission affirmed the judge's finding that the deep cut ventilation provision was mine-specific but, contrary to the judge, found that Peabody had negotiated in good faith. 15 FMSHRC at 385-88. The Commission remanded the case to the judge with the following instruction:

> We remand to the judge to decide whether the disputed provision was "suitable" to Peabody's mine[], as contemplated by 30 U.S.C. § 863(o). The Secretary bears the burden of proving that the plan provision at issue was suitable to the mine[] in question.

*Id.* at 388.

Peabody filed a petition for reconsideration with the Commission requesting clarification that the Secretary's burden of proof included a showing that Peabody's previously approved ventilation plan was unsuitable in addition to demonstrating that the disputed plan provision was suitable. The Secretary responded that, because he sought to have Peabody make changes in a previously approved plan, he had no objection to bearing the burden of proving both the unsuitability of the previously approved plan and the suitability of the new plan provision. The Commission denied the petition and ordered that the issues raised by Peabody be determined in the first instance by the judge on remand. *Peabody Coal Co.,* 15 FMSHRC 628 (April 1993) ("*Peabody II*").

B. Present Proceeding

On remand, the judge took further evidence on the issues of the unsuitability of the previously approved ventilation plan and the suitability of the new plan provision the Secretary had proposed. Tr. III. 3-4.[4] At the hearing, the Secretary modified the proposed plan provision because further testing revealed that, with airflow of 3,000 cfm at the inby end of the line curtain, there was sufficient ventilation to the face areas with a shorter line curtain. Under the modified plan provision, the line curtain was to be extended only to the fourth row of roof bolts outby the row being installed (about 20 feet from the last row of roof bolts); under the earlier proposed

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[4] The judge conducted two hearings in this matter, the first on August 7 and 8, 1991, and the second, after remand, on June 17, 1993. "Tr. I" refers to the transcript volume of the hearing on August 7; "Tr. II" to the August 8 hearing transcript; and "Tr. III" to the June 17 hearing transcript.

provision, the line curtain was extended to the second row of roof bolts outby the row being installed (about 10 feet from the last row of roof bolts). 15 FMSHRC at 1704 n.2; Tr. III 19-21; Gov't Ex. 6A. The Secretary presented testimony and test results to support his position that the purpose of the new ventilation provision was to remove methane, respirable dust, and fumes from the face area during roof bolting and that, without such ventilation, an ignition was possible because of the presence of the roof bolter. Peabody introduced the results of its own ventilation studies regarding the sources and quantities of methane released in the mine. 15 FMSHRC at 1703-05.

The judge concluded that the Secretary met his burden of proving that the prior plan was no longer suitable to the mine and that the proposed plan provision was suitable. 15 FMSHRC at 1705-06. The judge found that the mine liberates large amounts of methane and is subject to 15-day spot inspections under section 103(i) of the Mine Act, 30 U.S.C. § 813(i), for mines liberating more than 200,000 cubic feet of methane during a 24-hour period. He also found, based on Peabody's tests, that methane is liberated from the working faces of the mine. 15 FMSHRC at 1703-05. The judge relied on the Secretary's tracer gas tests, which showed that, under the previously approved ventilation plan, little or no methane present in unventilated deep cut areas would be diluted or removed and that methane would accumulate in increasing concentrations while the roof bolting machine was in operation. 15 FMSHRC at 1704-05. He noted that the roof bolting machine could at any time become an ignition source. *Id.* at 1705. Finding the prior plan unsuitable to address this safety hazard, he determined that the new plan provision addressed the hazard because "the ventilating air clearly sweeps the face area." *Id.* at 1704. Accordingly, he affirmed the citation and dismissed the contest. *Id.* at 1706.

## II.

## Disposition

### A. Position of the Parties

Peabody argues that the judge's formulation of the test for suitability was erroneous. PDR at 2; P. Br. at 16. Peabody asserts that the judge permitted the Secretary to articulate only a "possible hazard, without making any showing that the hazard exists or is reasonably likely to occur at Martwick . . . ." P. Br. at 16. Peabody also argues that the Martwick Mine has operated safely for years without the provision in question. P. Br. at 17. Peabody further asserts that: the showing the judge imposed on the Secretary was inconsistent with the Commission's remand instructions; the judge's suitability determination was premised on the incorrect assumption of a requirement that there be adequate ventilation to the face during roof bolting; evidence was lacking that methane accumulated at the face during roof bolting; and the previous plan provision required adequate ventilation of face areas during active mining. P. Br. at 18, 20, 27, 29-31.

The Secretary argues that substantial evidence supports the judge's determination that the previously approved plan was unsuitable and the proposed plan provision was suitable. S. Br. at 9-19. The Secretary further argues that plan provisions should be given the same legal effect as a mandatory standard adopted through rulemaking and should therefore be reviewed under an arbitrary and capricious standard of review. S. Br. at 26-34. In response, Peabody contends that, because the procedural safeguards of notice-and-comment rulemaking are absent in the plan approval context, the arbitrary and capricious standard of review is inappropriate. P. Reply Br. at 17-20.

B. Analysis

Section 303(o) of the Mine Act, the statutory sponsor of the ventilation plan regulation at issue, provides:

> A ventilation system and methane and dust control plan and revisions thereof *suitable to the conditions and the mining system of the coal mine* and approved by the Secretary shall be adopted by the operator . . . .

30 U.S.C. § 863(o) (emphasis added). As the Commission noted in *Peabody I,* "[M]ine ventilation or roof control plan provisions must address the specific conditions of a particular mine." 15 FMSHRC at 386. *See UMWA v. Dole*, 870 F.2d 662, 669 (D.C. Cir. 1989). While the contents of a plan are based on consultation between the Secretary and the operator (*see, e.g., Penn Allegh Coal Co.,* 3 FMSHRC 2767, 2773 (December 1981)), "the Secretary must independently exercise his judgment with respect to the content of such plans in connection with his final approval of the plan." *UMWA v. Dole,* 870 F.2d at 669 n.10, *quoting* S. Rep. No. 181, 95th Cong., 1st Sess. 25 (1977), *reprinted* in Senate Subcommittee on Labor, Committee on Human Resources, 95th Cong., 2nd Sess., *Legislative History of the Federal Mine Safety and Health Act of 1977,* at 613 (1978).

We reject Peabody's proposal that the Secretary be required to prove the hazard addressed by a new plan provision either exists or is reasonably likely to occur. Section 303(o), in setting forth the requirement that a ventilation plan be suitable to mining conditions, does not require that plan provisions be based on the existence of specific hazards or the likelihood that specific hazards may occur. In the absence of a statutory definition or a technical usage of the term "suitable," we apply the ordinary meaning of the word. *See Thompson Brothers Coal Co.,* 6 FMSHRC 2091, 2096 (September 1984). "Suitable" is defined as "matching or correspondent," "adapted to a use or purpose: fit," "appropriate from the viewpoint of . . . convenience, or fitness: proper, right," "having the necessary qualifications: meeting requirements." *Webster's Third New International Dictionary* 2286 (1986). We conclude that the Secretary carried his burden of proving the unsuitability of the former plan and the suitability of the new provision once he identified a specific mine condition not addressed in the previously approved ventilation plan and addressed by the new provision.

In order to establish that, under former section 75.316, Peabody improperly refused to include a provision in its ventilation plan, the Secretary agreed for purposes of this litigation to assume the burden of proving: (1) the previously approved plan is no longer suitable to the conditions and the mining system of the coal mine, and (2) the new plan provision is suitable. *Peabody II,* 15 FMSHRC 628. The Commission is bound by the substantial evidence test when reviewing an administrative law judge's factual determination. 30 U.S.C. § 823(d)(2)(A)(ii)(I). "Substantial evidence" means "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *See, e.g.*, *Rochester & Pittsburgh Coal Co.*, 11 FMSHRC 2159, 2163 (November 1989), *quoting Consolidation Edison Co. v. NLRB,* 305 U.S. 197, 229 (1938). We are guided by the settled principle that, in reviewing the whole record, an appellate tribunal must also consider anything that "fairly detracts" from the weight of the evidence that may be considered as supporting a challenged finding. *Universal Camera Corp. v. NLRB,* 340 U.S. 474, 488 (1951).

The Secretary's concern with ventilation of deep cuts during roof bolting originated with a report by MSHA's Pittsburgh Safety and Health Technology Center, "Ventilation Requirements and Procedures for Extended (Deep) Cuts with Remote Controlled Continuous Miners." Tr. I 26-31; Gov't Ex. 2. In response to that report, the Secretary began reviewing plans to determine whether and how deep cuts should be ventilated. Tr. I 48-49. The Secretary concluded that Martwick's previous plan requiring no ventilation during the roof bolting stage was inadequate. Tr. II 14-15, 82-84; Tr. III 71.

Further, Peabody's own ventilation study revealed that methane was released at faces following deep cuts. The Martwick Mine liberates large amounts of methane and is subject to 15-day review under section 103(i) of the Mine Act. 15 FMSHRC 1703-04. The record confirms the inherently unpredictable nature of methane liberation. Tr. III 28, 41-42, 71, 215-17, 224-25. Additionally, as the judge found, the roof bolter presented an ignition source and posed an "extreme potential hazard" under the prior plan if methane were to accumulate at dangerous levels. 15 FMSHRC at 1705. The Secretary's tracer gas tests also demonstrated that, without the recommended provision, sufficient air to dilute methane concentrations did not reach the face. Concerning the suitability of the new provision, the Secretary's tracer gas tests showed that the new provision would adequately ventilate the face and dilute any methane concentrations present.

Accordingly, we find that substantial record evidence supports the judge's finding that the previously approved plan was unsuitable and the new provision was suitable to conditions at the Martwick Mine.

We reject Peabody's assertion that the judge based his decision, in part, on a mistaken belief that the Secretary's regulations require a certain level of ventilation during roof bolting. PDR at 8; P. Br. at 21-22. We agree with the Secretary (S. Br. at 19 n.9) that the judge did not rest his determination on an assumption that ventilation of deep cuts during roof bolting was

required by mandatory standards. Rather, the judge concluded that the Secretary had presented sufficient evidence to prove that such ventilation was suitable to the Martwick Mine. 15 FMSHRC at 1705.[5]

Peabody also asserts that its prior plan required a deflector curtain in deep cuts. PDR at 13; P. Br. at 27-28. If this is an argument that the prior plan contained the same line curtain requirement as the proposed provision, we reject it. The prior plan did not require installation of curtain before completion of roof bolting and did not specify minimum airflow or a particular length of line curtain, the requirements that the Secretary sought to impose in the new provision.

We need not reach the Secretary's argument that, because a plan provision once approved by the Secretary has the same legal effect as a mandatory standard, he is to be accorded deference and the plan provision is to be reviewed under an arbitrary and capricious standard of review. S. Br. 26-28. The Secretary's position on this issue was rejected by the judge (*see* Order Denying Motion for Summary Decision, May 22, 1991) and the Secretary did not seek review. The issues on review were defined by the Commission's remand order and are narrowly focused--whether the Secretary carried his burden of proving that the previously approved plan was unsuitable and that the new plan provision was suitable to the conditions at the Martwick Mine. While we note, as did the court in *UMWA v. Dole,* 870 F. 2d at 669 n.10, that the plan approval process involves an element of judgment on the part of the Secretary,[6] when that judgment is challenged, the Secretary must sustain his burden of proof with regard to suitability.

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[5] Given our conclusion, we need not rule on Peabody's assertion that no minimum level of ventilation is required during roof bolting. However, we note that section 303(b) of the Mine Act, 30 U.S.C. § 863(b), requires delivery of a minimum quantity of 3,000 cfm of ventilating air at each "working face."

[6] *See also Monterey Coal Co.,* 5 FMSHRC 1010, 1019 (June 1983) (withdrawal of approval of water impoundment plan was not arbitrary or capricious where MSHA's conduct throughout the process was reasonable).

III.

Conclusion

For the foregoing reasons, we affirm the judge's decision.

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Mary Lu Jordan, Chairman

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Arlene Holen, Commissioner

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Marc Lincoln Marks, Commissioner